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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARCUS NICKELBERRY, Defendant and Appellant.	A130014 (Solano County Super. Ct. No. VCR205764)

Defendant Marcus Nickelberry was convicted of two counts of robbery and other crimes in connection with an armed robbery at a pizza restaurant in Vallejo. In his opening brief, defendant challenges almost every aspect of the proceedings below. We reject each of his arguments and affirm the judgment.

I.
FACTUAL AND PROCEDURAL BACKGROUND

On the morning of December 6, 2009, defendant, who was armed with a shotgun, approached a customer leaving a pizza restaurant in Vallejo, and demanded all the customer's money. The customer pushed on defendant's weapon so that it would remain pointed down, backed up toward a building, tripped, and fell down. His cell phone fell out of his pocket, and defendant took the phone. Defendant then entered the pizza restaurant, pushed the shotgun into a restaurant employee, and demanded money. The employee recognized defendant as the same person who had earlier asked for a free pizza, and had hung around the restaurant for about 15 minutes, stating that he was

waiting for his cousin. The employee gave defendant money from the restaurant's cash register, totaling between $120 and $150.

Defendant fled the restaurant, got into a gray/silver truck, and fled to a Vallejo home that he occasionally visited. Police searched the home and found a brown briefcase belonging to defendant that contained a sawed-off shotgun, later identified as the one used during the robbery. Police also recovered the cell phone taken from the pizza restaurant customer.

Defendant was charged by information with two counts of robbery (Pen. Code, § 211[1]—counts 1 & 2), one count of possession of a short-barreled shotgun or rifle (former § 12020, subd. (a)—count 3), and one count of possession of a firearm by a felon (former § 12021, subd. (a)(2)—count 4).[2] The information further alleged that defendant personally used a firearm during the commission of counts 1 and 2 (former §§ 12022.5, subd. (a), 12022.53, subd. (b)), and that he had suffered one prior strike (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

Defendant testified on his own behalf at trial, and denied being at the pizza restaurant when the robbery took place. A jury convicted defendant as charged and found the firearm enhancements to be true. Following a bifurcated court trial, the trial court found the prior strike allegation true.

The trial court sentenced defendant in this case to 26 years, 4 months in prison. The trial court also imposed a consecutive eight-month sentence in connection with a separate case, where defendant was found to have violated the terms of his probation by committing the crimes in this case, for a total of 27 years in prison. Defendant timely appealed.

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] Defendant also was charged with receiving stolen property (§ 496, subd. (a)—count 5); however, the count later was dismissed on the People's motion.

II.
DISCUSSION

A. Ineffective Assistance of Counsel.

1. General legal principles

Defendant claims that his trial counsel provided ineffective assistance of counsel in a number of respects. In order to show ineffective assistance of counsel, defendant must show both that counsel's performance was deficient and that the performance prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) "To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.' [Citation.] A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance. [Citation.] The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' [Citation.]" (*Harrington v. Richter* (2011) __ U.S. __, 131 S.Ct. 770, 787.) "With respect to prejudice, a challenger must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.] It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' [Citation.] Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.]" (*Id.* at pp. 787-788.)

" 'Surmounting *Strickland*'s high bar is never an easy task.' [Citation.] An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation.] Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of

materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' [Citations.] The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom. [Citation.]" (*Harrington v. Richter*, *supra*, 131 S.Ct. at p. 788.)[3]

2. No motion to suppress items found in home

a. Background

At the preliminary hearing, a police officer testified that he received a description of the vehicle in which the robbery suspect fled, and he located a vehicle matching that description parked in the neighborhood. A resident near where the vehicle was parked told the officer that the vehicle's owner had entered a nearby house. The officer requested additional units, set up a perimeter around the house, and called the occupants out of the house using an intercom system. A woman described by the officer as "[t]he actual homeowner, an elderly black female" (Jennifer Banks) came out of the house, and told the officer that defendant was still in the home. Banks also told the officer that defendant had arrived at her home 15 minutes before she spoke to police, and that he was carrying a brown briefcase when he arrived.

The officer testified that "[a]fter the defendant came out [of the house], we then continued to announce and then we were confident that, um, there was potentially no one else in the house, we went in and searched the house for additional suspects; cleared the house." He further testified that, following the issuance of a search warrant, the officer searched a brown briefcase identified by Ms. Banks as belonging to defendant, and found a sawed-off shotgun inside that matched the description of the weapon used during the robbery.

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3 Defendant is correct that *Harrington* also addressed the standard of review applicable in federal habeas petitions; however, the quoted portions of the opinion above addressed the general principles of an ineffective assistance of counsel claim applicable whenever a court is asked to review such a claim under *Strickland*. (*Harrington v. Richter*, *supra*, 131 S.Ct. at p. 788.)

On cross-examination, defense counsel asked, "When you went into the house the first time, was that done by the permission of Ms. Banks?" The officer answered, "Yes, it was."

b. Analysis

Defendant argues that his trial attorney provided ineffective assistance of counsel by failing to file a motion to suppress the evidence seized from the home where he was found after the armed robbery. He claims that the search of the home clearly did not satisfy the requirements for a lawful " 'protective sweep,' " because the searching officer could not have possessed a reasonable belief that the area swept harbored individuals posing a danger to the officer or others. (*Maryland v. Buie* (1990) 494 U.S. 325, 327.) Defendant further argues that, as an overnight guest, he had standing to challenge the search on Fourth Amendment grounds. (*Minnesota v. Olson* (1990) 495 U.S. 91, 97-98.)

Although defendant may have had standing to challenge the search of the home, the testimony above demonstrates that such a challenge would have lacked merit, because police initially searched the home with the consent of the homeowner. "With regard to a warrantless search of property, it is well settled that such is reasonable under the Fourth Amendment where proper consent is given." (*People v. Oldham* (2000) 81 Cal.App.4th 1, 9; see also *People v. Carr* (1972) 8 Cal.3d 287, 298 [search not unreasonable when made with consent of third party whom police reasonably and in good faith believe has authority to consent].) Once they saw the briefcase suspected to be connected to defendant in the course of the lawful search, the police obtained a search warrant before seizing and searching it. We agree with respondent that all these facts support a finding that the search of the house, as well as the search and seizure of the briefcase, was lawful, and that defense counsel was not obligated to make a meritless motion to suppress. (*People v. Catlin* (2001) 26 Cal.4th 81, 163.)

At trial, the police officer who searched the house was asked whether he toured the house with Ms. Banks, and he testified that "I brought her into the house . . . ." Defendant claims that this testimony "indicated detention and control," and that Ms. Banks therefore "could not give valid consent to search while she was detained

without probable cause." (*Florida v. Royer* (1982) 460 U.S. 491, 497 [where validity of search rests on consent, state has burden to prove that necessary consent was "freely and voluntarily given"].) However, " '[b]ecause the legality of the search was never challenged or litigated, facts necessary to a determination of that issue are lacking.' " (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) "An appellate court should not declare that a police officer acted unlawfully, suppress relevant evidence, set aside a jury verdict, and brand a defense attorney incompetent unless it can be truly confident all the relevant facts have been developed and the police and prosecution had a full opportunity to defend the admissibility of the evidence." (*Id.* at p. 267.) Because the officer was not specifically asked at trial whether Ms. Banks consented to the search of her home, no one gave him the opportunity to explain whether he "brought" Mr. Banks into her home after receiving her valid consent. On the record before us, it would be inappropriate to declare that the officer acted unlawfully, resulting in an unlawful search. (*Ibid.*)

3. No motion to suppress items found in defendant's truck

a. Background

The same is true for items found in defendant's truck. Witnesses told the police officer who responded to the pizza restaurant that the suspect had fled in a silver, older model Ford pickup truck. The officer searched the neighborhood and found a vehicle matching that description. The license plate did not belong to the vehicle, but a check of the truck's vehicle identification number showed that the truck was registered to defendant. A picture of the truck admitted at trial revealed a hat matching the description of the one worn by defendant during the robbery, and the hat found in the truck also was admitted into evidence.

b. Analysis

Defendant claims that he received ineffective assistance of counsel, because defense counsel did not file a motion to suppress evidence seized from his truck "via warrantless search." (Capitalization and boldface omitted.) However, there is nothing in the record regarding when the truck was searched, or whether in fact police obtained a

search warrant before such a search.[4] Because (1) the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, (2) counsel was not asked for an explanation but failed to provide one, and (3) there could be a satisfactory explanation for counsel's approach, defendant's claim on appeal must be rejected. (*People v. Mendoza Tello, supra,* 15 Cal.4th at p. 266.)

Even assuming arguendo that a motion to suppress had merit, defendant cannot demonstrate a reasonable probability that, but for the error in failing to file such a motion, the result of the trial would have been different. (*Harrington v. Richter, supra,* 131 S.Ct. at p. 787.) The pizza restaurant employee positively identified defendant both on the day of the robbery and at trial, and the restaurant customer whose cell phone was taken said that, although he was "not a hundred percent on [his] identification," defendant looked like the person who robbed him. The jury also heard testimony that the gun located in the home where defendant was found was connected to him, and that it matched the description of the gun used during the robbery. Police also recovered the cell phone taken during the robbery at the home where defendant was found. Even absent testimony regarding the contents of defendant's truck, there is no reasonable probability that defendant would have been acquitted.

4. No motion to exclude show-up identification procedure

Defendant next argues that his counsel provided ineffective assistance of counsel by failing to file a motion to suppress evidence of the one-on-one show-up identification of defendant. The pizza restaurant employee testified at the preliminary hearing that about 30 to 40 minutes after the robbery, he was taken to view a suspect. The employee viewed defendant standing about 20 to 30 feet away, during daylight hours. Defendant

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[4] Defendant claimed in his opening brief, filed in June 2011, that "the habeas petition filed in conjunction with this direct appeal confirms that no search warrant for Appellant's truck was ever obtained." Defendant referred elsewhere in his opening and reply briefs to facts not contained in the appellate record, but that were supposedly contained in a related habeas petition. However, no such habeas petition was filed until April 3, 2012. (*In re Marcus A. Nickelberry*, No. A135018.) An order denying defendant's petition was filed by this court on April 12, 2012.

was in handcuffs, standing outside a police car with two or three police officers next to him, and defendant was the only suspect the restaurant employee was asked to view. At trial, the employee testified that he viewed defendant about an hour after he was robbed, and that he identified defendant as the person who committed the crime.

Had defendant filed below a motion to preclude evidence of the show-up, he would have borne the burden of showing an unreliable identification procedure. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) " 'The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.] In other words, '[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.' [Citation.]" (*Ibid.*)

Defendant claims that there were no exigent circumstances justifying the use of a one-on-one show up, as opposed to a line-up, in this case. He also argues that the show-up was "highly suggestive and unreliable," because there were various discrepancies in the description of the suspect the employee gave to police and defendant's actual appearance, and because defendant was viewed in the presence of a police car and two officers. Respondent highlights the facts that the restaurant employee identified defendant shortly after the crime and had ample time to observe defendant (who had spent about 15 minutes with the employee before defendant left the restaurant and robbed the customer), and single-person show-ups are not inherently unfair (*People v. Clark* (1992) 3 Cal.4th 41, 136).

Defendant's arguments suffer from the same deficiencies as his arguments regarding his counsel's failure to file motions to suppress: because the record on appeal

sheds little light on " 'the totality of the circumstances' " surrounding the show-up identification (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 412), facts necessary to a determination of the issue are lacking in the record on appeal. (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.) In *In re Hall* (1981) 30 Cal.3d 408, upon which defendant relies, the court upheld a finding that counsel was ineffective in failing to investigate or challenge the identification procedures used by police, based on evidence gathered during an independent, posttrial investigation of the case that was presented to the court through an appointed referee, who prepared a report of his findings of fact following a full adversarial hearing at which 31 witnesses testified. (*Id.* at pp. 415-416, 430-434.) Here, by contrast, the record does not indicate what police may or may not have told the restaurant employee before he identified defendant. Defendant argues that this court may draw a series of inferences that are unsupported by the record, such as the fact that the employee might have been told of the circumstances of defendant's arrest, and "perhaps" of a police officer's familiarity with the house where defendant was arrested. He also asks this court to infer that police directed defendant to wear a hat during the identification procedure that matched the description of the one the suspect wore during the robbery, whereas the record is ambiguous (at best) on this point.[5] We therefore reject his arguments regarding the show-up identification.

5. Cross-examination of witnesses

Defendant next argues that his trial attorney was "prejudicially ineffective in failing to meaningfully cross-examine prosecution witnesses." (Capitalization and boldface omitted.) " 'Where the case involves an ineffective assistance claim of the sort at issue here [that is, the alleged failure to adequately cross-examine witnesses], no prejudice typically appears unless counsel's . . . performance resulted in the loss of

[5] At trial, the restaurant employee testified that he was taken to a location on the day of the robbery to view a suspect, and that he identified defendant as the person who robbed him. The prosecutor then asked, "Okay, now when *this incident* occurred, was the defendant wearing a hat that you remember?" and the employee testified, "Yeah, he was wearing a big green hat." (Italics added.) We agree with respondent that the phrase "this incident" likely referred to *the robbery*, as opposed to the viewing of defendant.

material evidence and caused tangible harm to the defense at trial. [Citations.]' [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1138.) Defendant makes no such showing here, as revealed by an examination of the specific examples he raises.

Police officer's testimony regarding finding defendant: The police officer who tracked down defendant's truck and later located defendant in a nearby house testified that after he found the truck, a neighbor told the officer that he had seen the man who owned the truck going into a home on El Dorado Street. The neighbor gave the officer a description of the man that matched the description of the robbery suspect (an "extremely large" black man), and the officer testified that he was "personally familiar" with the house, because police had "made numerous arrests there for subjects that were engaged in criminal activity in the past." Defendant claims that the testimony about the neighbor was "strange," and that defense counsel was ineffective for not asking why the neighbor would notice such a "mundane event." He likewise claims that defense counsel was ineffective for failing to question the officer's story at trial that the truck was parked "five to seven blocks" away from the house where defendant was found.

As set forth above, unlike this court, defendant's trial attorney had access to materials outside the record, and interacted with opposing counsel and the judge. We therefore should not second-guess counsel's assistance absent a showing that his performance amounted to incompetence under prevailing professional norms. (*Harrington v. Richter*, *supra*, 131 S.Ct. at p. 788.) It may be that defense counsel had access to information that would support the neighbor's version of events, and defendant does not explain how cross-examination on this topic would have led to a different result in any event. As for the testimony about the distance between the truck and the house where defendant was found, it may well be that the officer misspoke, and was actually referring to the distance between *the pizza restaurant* and where the truck was found, consistent with the prosecutor's comment on that distance during closing argument. In that case, clarification on cross-examination only would have highlighted that the truck was in fact found closer to the home.

Testimony regarding other occupants of home where defendant was found: The same police officer testified at the preliminary hearing that other occupants of the house where defendant was found, including two other men besides defendant, came out of the home when police cleared the residence. Defendant claims, without citation to the record, that defendant's shotgun was found in a bedroom shared by those two men, and that defense counsel was thus ineffective for failing to ask more about the men's backgrounds. First, although the officer testified that the gun was found in a bedroom, defendant directs this court to no evidence that either of the other occupants of the home was connected with that bedroom. Second, again, defendant does not explain how asking about the two men would have changed the outcome of the trial. As respondent notes, an investigation of the two men may have revealed no evidence of possible third-party culpability.

Description of Ms. Banks: At the preliminary hearing, the police officer described Ms. Banks as "the actual homeowner" of the residence where defendant was found, stated that she was "an elderly black female," and testified that she came out of the house with "children, small children," as well as with two men. At trial, the officer testified that Ms. Banks came out of the house with "maybe four small children," and that a man who was not mentioned at the preliminary hearing also came out of the home with her. Ms. Banks testified at trial that she was five months pregnant on the day her home was searched (as opposed to being elderly), and the police officer described her as "the actual renter [as opposed to owner] of the location." Although defense counsel did not cross-examine witnesses regarding the description of Ms. Banks, as defendant claims, these details are so tangential to the issue of defendant's guilt that we see no reason to set aside the jury's verdict based on the failure to ask such questions.

State of defendant's truck: The police officer who testified at the preliminary hearing stated that, when he found defendant's truck, the hood was cold. As defendant notes on appeal, defense counsel did not elicit this information at trial, and instead simply pointed out during closing argument that there was an absence of evidence over whether the truck was warm to the touch. Testimony at trial revealed that the pizza restaurant that

was robbed was located at 2820 Sonoma Boulevard in Vallejo, and that defendant's truck was found in the 100 block of Michigan Street in Vallejo. Although there was no testimony regarding how close those two locations are, the prosecutor stated during rebuttal argument, without objection, that the truck was parked about seven blocks away from the pizza restaurant. Absent a clear indication that the truck would have been warm after having been driven only seven blocks, then parked for some period of time before the officer found it, we do not consider the failure to ask about this fact to have been crucial to defendant's case. In fact, any testimony about the truck's hood being cold may have served only to undermine defendant's testimony that he had been driving with his uncle for about 45 minutes to more than an hour before he returned to the house where he was later found.

Restaurant employee's testimony regarding gun: At the preliminary hearing, the restaurant employee described the gun that was used during the robbery as "a full, long barrel, as I was like—inch [*sic*] width of, you know, the (indicating) exit point," but apparently was not shown the gun in question. At trial, the employee was shown a 19-inch shotgun, and he identified it as the gun that defendant used during the robbery. Defendant claims that his attorney was ineffective for not asking about the employee's description of the gun at the preliminary hearing as having a full, long barrel. Without a picture of the gun or any indication that the employee's testimonies were inconsistent, defendant has not shown that eliciting information from the preliminary hearing would have changed the outcome of the trial.

Restaurant employee's testimony regarding identification: The restaurant employee testified at trial that he called 911 after the robbery, and told the dispatcher that there was a witness who could probably give a "better description" of the robber, then handed the telephone to the customer whose cell phone was taken. On cross-examination, defense counsel questioned the employee about how closely he paid attention to defendant during the time before the robbery, and elicited testimony that the employee was "just doing [his] duties," and that the time spent talking with defendant was "very brief." During closing argument, defense counsel argued that although the

employee testified that he was able to identify defendant on the day of the robbery, "do you think you can make a mistake[?] Did you hear anything at all about this lineup, anything about the credibility about it, was it even a lineup[?] What do you know[?] I mean, that's typical of everything the prosecution has done here. They want you to make these big leaps, these big leaps to connect everything which they never did."

Defendant argues that his counsel was ineffective for failing to ask why the employee was certain of his identification of defendant, if he had previously told a dispatcher that there was someone else who probably could give a better description of him. He further argues that counsel likewise failed to highlight the suggestive circumstances of the show-up identification procedure. However, a review of the trial transcript reveals that counsel *did* highlight to the jury possible shortcomings with the identification procedure, noting that the employee may not have been paying close attention to defendant's appearance when he was first in the restaurant. It may also be that drawing more attention to the identification process could have served only to highlight the employee's certainty about his identification. The prosecutor argued to the jury, without objection, that defendant had distinctive features—referring to him as "huge" and having "dreads down to his shoulders." Questioning the employee further about his identification of defendant may have served only to highlight the employee's certainty over the identification of a person with such distinctive characteristics. We cannot conclude on the record before us that counsel's performance "fell below an objective standard of reasonableness." (*Strickland*, *supra*, 466 U.S. at p. 688.)

Description of hat defendant wore during robbery: At the preliminary hearing, the prosecutor asked the customer whose cell phone was taken whether the person who robbed him had the same type of hair ("long jheri curls") as defendant did in court. The customer testified that he could not see much of the robber's hair, because "his head seemed to be framed. There seemed to be something on his head; whether it was a hood of a sweater or something over the top so the sides of his hair wasn't—wasn't really evident, I could see some of the front of the hair and the shape of his face, but that's why I can't—" When asked for a more detailed description, the customer testified, "If I was

asked to pick a color, I would probably choose olive green, something like that. It didn't seem to me to have a bright color. To me, it didn't seem to be black. It wasn't white, so I don't remember it as being a striking color." At trial, the prosecutor asked the customer whether a "green beanie" admitted into evidence looked familiar, and the customer testified that the beanie "appears to be what the person had on their head, the person that I encountered in the parking lot." Defendant claims that defense counsel never asked about how the witness could identify the beanie at trial, when he was not able to describe at the preliminary hearing whether the robber was wearing a hat or a hood. However, unlike at trial, at the preliminary hearing the customer was not shown a particular piece of clothing. Moreover, the customer's description at the preliminary hearing of what defendant was wearing—something green on his head—does not appear to be inconsistent with his testimony at trial. We cannot say on the record before us that failure to cross-examine the customer on this detail caused tangible harm to the defense. (*People v. Carter*, *supra*, 36 Cal.4th at p. 1138.)

Description of gun: The customer who was robbed testified at the preliminary hearing that defendant used a gun during the robbery, and that it "looked like it could be a shotgun of some sort." At trial, the customer testified that "[w]hat caught my attention [about the firearm] was that the end had been cut or sawed off somehow and that there was a jagged edge," and he identified People's exhibit No. 1 as the gun that was used during the robbery. He further testified that he was "not a hundred percent" on his identification of defendant, and that he was focusing more on defendant's gun than on his face during the robbery. As for whether he was certain of his identification of the weapon at trial, he testified on cross-examination, "My feeling on the weapon is 100 percent." We do not agree with defendant that his trial attorney was ineffective for failing to elicit on cross-examination why the customer did not describe the shotgun during the preliminary hearing as having a jagged edge, when he was apparently not asked to describe the gun in great detail at that time.

In sum, "[t]he cross-examination of witnesses is a matter falling within the discretion of counsel, and rarely provides an adequate basis on appeal for a claim of

ineffective assistance of counsel. [Citations.] Because defendant fails to disclose what evidence, if any, counsel might have elicited had he subjected prosecution witnesses to more rigorous cross-examination, his claim of inadequate assistance does not succeed." (*People v. Frye* (1998) 18 Cal.4th 894, 985, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

6. Defense counsel's closing argument

a. Background

During cross-examination of the restaurant employee at trial, the following exchange took place regarding the firearm used during the robbery:

"Q Are you familiar with guns at all?

"A Not really. I fired some, I guess.

"Q So it was a rifle of some type?

"A Yeah, it was a rifle.

"Q You know the difference between a rifle—

"A A rifle, a handgun.

"Q —a revolver, all that?

"A Yes.

"Q Prior to seeing it [the weapon] here today, had you ever handled a weapon like this at all?

"A I've handled a .22 rifle. That's about it.

"Q But nothing of this nature?

"A No.

"Q Nothing that looked like that?

"A Well, I used a shotgun as well.

"Q Oh, like this?

"A No a bigger shotgun, way bigger."

b. Analysis

Defendant argues that his attorney provided ineffective assistance of counsel during closing argument, because he failed to highlight that the restaurant employee

testified that he was "acquainted with firearms," yet testified that defendant was armed with a rifle (as opposed to a shotgun). He claims that had this fact been highlighted during closing argument, it "would have blown the prosecution case out of the water." We agree with respondent that defendant "clearly overstates the importance of the exchange during cross-examination," and that calling defendant's gun a rifle instead of a shotgun did no more than demonstrate that the witness was not overly familiar with firearms. Defendant has made no showing that highlighting such a meaningless misstatement by the witness would have led to a different outcome at trial.

B. Marsden *Motions*.

1. Background

a. First *Marsden* motion

Before trial, defendant filed a motion requesting that the trial court dismiss defendant's prior strike, pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. The trial court denied the motion after counsel submitted on the motion at a hearing on April 27, 2010. Defendant then told the trial court that he wanted a new attorney because he did not think that his current counsel was capable of representing him, and stated that he had a written motion available for the trial court's consideration. The trial court told defendant that defendant could file a written motion if he wanted, but that the court could consider his request for a new attorney without a formal motion. Defendant chose to present his motion orally (without filing any paperwork), and the trial court held a hearing later that day outside the presence of the prosecutor, pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

At the hearing, defendant complained that his attorney was not spending adequate time on his case, and had "put mine on the back burner." The court explained that any lawyer who represented him would be handling other cases, and that "[y]ou don't want the lawyer that only has your case." When asked whether there were specific tasks that defendant had asked his attorney to perform that were not done, defendant complained that he wanted to know whether police had found fingerprints on the gun that had been seized. He also requested that counsel check into "the background of the officer"

(presumably, the one who had testified at the preliminary hearing), but that "none of it came into play into Court [*sic*]." Defendant further complained that his attorney had told him that he was " 'going to lose,' " and asked, "What are you [meaning, his attorney] here for me to represent me if you just come in and say, 'Oh, no, you are going to lose. You have to take this deal.' " He also was disappointed that his attorney had told him that he would lose his *Romero* motion, and was under the mistaken impression that his attorney had been obligated to file such a motion before trial. The trial court told defendant that "[t]he reason you lost the *Romero* motion wasn't because of your lawyer; it was the Court denied it." The court also explained that "it was well-written what he gave me. It wasn't one of these ones that I just denied off the top of my head." Finally, defendant complained that every time he talked with his attorney, "we have like a, it's like, you know, kind of conflict, basically."

Defense counsel explained that the district attorney was still trying to determine whether there were any fingerprints on the recovered gun, but there had been no results yet. As for obtaining "background" on the officers, counsel explained that "[t]he officers were not a primary witness or anything. It is not even relevant to the issue in this case." When asked whether counsel had a conflict with defendant, defendant's attorney responded, "No. I've been very candid with him. It's a very difficult case. There are multiple ID's. They're not officers that place him at the scene; plus, a number of other evidence that places him there immediately in the area afterwards. [¶] I'd given him my honest assessment of the case. He quite frankly doesn't believe me when I explained to him that he's not even eligible for probation, not only because of the prior strike, but because of the manner in which it is charged and the use of the weapon. [¶] I cannot—I've explained that to him repeatedly. He does not like those answers . . . ."

Defendant then speculated that the police officer involved "could have lied in previous cases," and he pointed out that he did not live at the house where he was arrested. Finally, defendant complained that the police report stated that the suspect weighed 135 pounds (considerably less than defendant weighed). His attorney noted that he had questioned the officer about the discrepancy during the preliminary hearing, and

that the discrepancy was explained to be due to inadvertently transposing numbers when preparing the report. The trial court noted that the discrepancy was "something we can deal with at trial," and denied defendant's *Marsden* motion. Defendant then asked, "So I have to keep this lawyer?" The trial court answered, "No, you can hire your own lawyer at your own cost, but I'm not appointing another one." After the courtroom was reopened and the trial court discussed scheduling a trial date with counsel, the court told defendant, "If you hire a lawyer, let me know, Mr. Nickelberry. I'll put this [a June 30th trial date] on calendar; probably have to continue your matter."

b. Second *Marsden* motion

At a trial management conference on June 28, 2010, defendant stated that he wanted to file another *Marsden* motion, handed a written motion to the trial court (Judge Robert Bowers, the same judge who had considered the previous *Marsden* motion), and informed the court that his mother was in the audience and available to testify as a witness. The trial court permitted the written motion to be filed, but denied it as untimely.[6] Defendant protested that "I'm not going to go to trial with this lawyer," and that his attorney had "cursed me out. He called me fucking stupid and crazy. He's fucking stupid and crazy, you know? And I'm not going to trial with this lawyer, you know." In response to defendant's statement that he wanted to represent himself, the trial court suggested that defendant "fill out a *Faretta*[7] waiver form and bring it on Wednesday. I don't advise you to go pro per, but you can do that." The following exchange then took place:

"The Defendant: I want to waive my trial date; don't want to—

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6 It is unclear whether defendant was attempting to file the written motion that he had prepared in advance of the April 27 hearing. The written motion is dated June 28, but raises many of the same complaints that defendant addressed at the April 27 hearing (such as the fact that his attorney had not determined whether fingerprints had been recovered from the gun at issue, and had prepared an inadequate *Romero* motion). After denying defendant's second motion, the trial court stated, "I've read [the motion]; it's similar."

7 *Faretta v. California* (1975) 422 U.S. 806, 835 (*Faretta*).

"The Court: We're not doing that. [¶] It's—this has been set for trial for a while.

"The Defendant: No, it hasn't. I didn't want to go to trial. I told the Court system that I did not want to go to trial, but you keep pushing me towards going towards trial.

"The Court: Right; you don't have a choice.

"The Defendant: My lawyer, you—I should have a choice. It's my life. I should have a choice.

"The Court: Let me tell you: You are charged with these crimes. You want to plead open, you can do that. If not, you don't want to accept the deal of the People, we're going to trial.

"The Defendant: No, I need time. I need time and I'm not ready to go to trial.

"The Court: Not happening.

"The Defendant: I need time to find a new lawyer.

"The Court: It's not happening.

"The Defendant: How—how is that not possible, though?

"The Court: This took place last year. [¶] I'm not wasting the Court's time. This has been set for trial since—

"[Defendant's attorney]: Late April.

"The Defendant: If you read my *Marsden* that I filed, there's—there's specific reasons I wrote on there that why [*sic*] I'm not ready for trial.

"The Court: No, you are not—you want a new lawyer, and that's what a *Marsden* motion is about. I denied that.

"The Defendant: It's because some of the situations that my lawyer has not did [*sic*] for me with case laws that he did not file that coincides with my case, that, that if I would—if he would have filed them under the right case law, maybe it would have helped my case out more.

"The Court: I'm going to let you fill out a *Faretta* form; don't go anywhere, and you can represent yourself this week. As to whether Judge Moelk wants to give you a continuance or not, that will be up to him. [¶] I'll tell you right now, I'm not going to tolerate too much of this, Mr. Nickelberry. I will get you to trial."

The trial court gave defendant a *Faretta* form and told him, "I'm going to leave it up to Judge Moelk. He . . . may grant your continuance on Wednesday at trial; I doubt it, um, but if you can't be ready to represent yourself on Wednesday, then I think the Public Defender will be representing you, as your request is untimely. [¶] If he grants your request, then it will be put over."

Two days later, on the day trial was scheduled to begin, there apparently was no available courtroom in Vallejo (where witnesses were located), but the trial court (Judge Peter Foor) asked about the status of the case at a hearing in Fairfield. The court asked defendant if he had completed a *Faretta* waiver form, and defendant responded that he did not want to represent himself, and instead wanted a new appointed lawyer. After an unreported bench conversation, the trial court stated that a hearing would be held on defendant's second *Marsden* motion.

After the courtroom was cleared, defendant claimed that on June 10, his attorney had told him that he was "crazy" and called him "a couple [of] curse words, and he said that I was crazy for not taking the deal, and basically he was threatening me with taking this deal, and he told me he didn't care who I told." Defendant also complained that his attorney was "just inadequate," and was "not really doing what he's supposed to do." He said his attorney was "not sending no investigators out that actually, basically talk to the prosecution, I guess, you know. And he didn't have no basically—at my *Romero* hearing—yeah, the *Romero*, basically, he didn't have no defense for me," and prepared an inadequate motion. Defendant further complained that counsel had visited him only about four or five times in the six months that he had represented him, and that "every time he comes all he talks about is me signing this deal and threatening me with this deal." He also reported that he had told his attorney that he had a drug problem, and that he had been accepted for a program (apparently at Delancy Street), but that his attorney told him that he would "never get that."

The trial court explained to defendant that he was "absolutely ineligible for probation," and there was thus "absolutely no point about talking about Delancy Street." Defendant's attorney added that he had repeatedly told defendant that he was ineligible

for probation, that he had prepared a strong *Romero* motion, and that the district attorney was not offering any type of plea bargain that would make him eligible for probation. Counsel also stated that he had met with defendant more often than defendant claimed, that defendant was unable to help counsel or "point me in any direction that would he[l]p me," and that because there was no available alibi, there was "limited stuff I could do. I did what I could do." Defendant's attorney acknowledged that he had told defendant that he was "full of shit" for directing him to have co-counsel sitting next to him at trial, but that he "never told [defendant] he was crazy." Counsel also stated that he was prepared to go to trial.

The trial court told defendant that it sounded as if there was strong evidence of defendant's guilt, and that it was defense counsel's responsibility to be honest with his client, even if that leads to "bad feelings" because counsel "tells you things you don't want to hear." The trial court denied the *Marsden* motion, stating that counsel was ready to go to trial. The court then asked if defendant still wanted the trial court to consider a *Faretta* waiver, and defendant stated that he did not. Defendant did not request any additional time to prepare for trial or to retain his own attorney. Trial began on July 1, 2010.

2. Analysis

Defendant argues that the trial court conducted inadequate *Marsden* hearings and erred in denying the motions, issues we review for abuse of discretion. (*People v. Dickey* (2005) 35 Cal.4th 884, 917.) " 'A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. [Citations.]' [Citation.]" (*Ibid.*) A judge who considers a *Marsden* motion must give the complaining party " ' "an opportunity to present argument or evidence in support of his contention." ' " (*Ibid.*) Defendant has not demonstrated that the trial court failed to give him an adequate opportunity to present his argument, or that the court abused its discretion in denying his motions.

a. First *Marsden* motion

As for the first motion, defendant claims that his attorney's handling of his *Romero* motion was "grossly inadequate," and that the trial court's praise of the motion therefore was misplaced. However, defendant fails to establish that had the motion been prepared differently, it would have resulted in a different outcome.

Defendant also argues that the gun at issue should have been fingerprinted, as defendant insisted. (A police officer testified at trial that the gun never was tested for fingerprints.) Even assuming arguendo that it was defense counsel's responsibility to ensure that the gun was tested for fingerprints, the fact that it was not arguably *helped* defendant, because this enabled defendant's counsel to accurately argue to the jury that defendant's fingerprints never were found on the gun. Had the gun been tested and defendant's fingerprints discovered on it, this would only have served to support the prosecution's case.

Defendant also claims that he made a "legitimate point[]" when he argued that the testifying police officer's background should have been "investigated." However, he makes no showing that he could have established the requisite good cause for discovery of police records pursuant to Evidence Code section 1043, subdivision (b)(3) and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536-537. (E.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 827 [no abuse of discretion to deny *Pitchess* motion where no allegation that officers fabricated charges, committed violence against him, or obtained evidence against him by false arrest or illegal search and seizure].)

Finally, defendant argues that the judge who considered his first *Marsden* motion should have prepared by reading the preliminary hearing transcript. To the contrary, " '[t]o the extent there was a credibility question between defendant and counsel at the hearing, the court was "entitled to accept counsel's explanation." [Citation.]' [Citation.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1245-1246.)

b. Second *Marsden* motion

As for the second *Marsden* motion, defendant argues that the trial court was obligated to investigate whether counsel had failed to make potentially meritorious

motions to suppress. We disagree that the trial court was under any such obligation, and, as set forth above (pt. II.A.2.-4.), defendant has failed to establish that his attorney was ineffective for failing to file such motions in any event. Defendant also complains that the trial court failed to inquire regarding counsel's failure to "retain[] a licensed professional investigator," but does not specify what possible exculpatory information such an investigator might have uncovered.

Defendant also overstates the breakdown in communication between him and his attorney. It is clear that they disagreed over some of the decisions counsel made; however, "[t]here is no constitutional right to an attorney who would conduct the defense of the case in accord with the whims of an indigent defendant. [Citations.] Nor does a disagreement between defendant and appointed counsel concerning trial tactics necessarily compel the appointment of another attorney. [Citations.]" (*People v. Lucky* (1988) 45 Cal.3d 259, 281-282.) The trial court gave defendant ample opportunity to present argument and evidence in support of his *Marsden* motions, and the trial court did not abuse its discretion in denying them.

3. No error to deny continuance

Defendant argues that, after the trial court denied his second *Marsden* motion on June 28, 2010, as untimely, it thereafter committed reversible error by refusing defendant's request for a continuance "so that he could retain private counsel." Although it is true that defendant stated on June 28 that he "need[ed] time to find a new lawyer," this was in the context of telling the trial court that he wanted either a new *appointed* attorney or the opportunity to represent himself. Unlike the defendant in *People v. Courts* (1985) 37 Cal.3d 784, upon which defendant relies, defendant here never identified a specific attorney he wished to retain, or demonstrated that he had made financial arrangements to so. (*Id.* at pp. 787-789.)

Moreover, the trial court did not deny a continuance outright. Instead, the court told defendant that, after he completed a form indicating that he wanted to represent himself, *a different judge* could rule on whether defendant could have more time to prepare for trial. Defendant apparently never completed the necessary *Faretta* form,

instead telling the trial court two days after he was given the form that he no longer wanted to represent himself. After his second *Marsden* motion again was denied following a hearing, defendant made no further request for additional time, nor did he indicate that he wished to retain private counsel. Under the particular facts and circumstances of this case, we find no error in the way that the trial court handled defendant's repeated requests to have his appointed attorney replaced.

C. Photograph of Defendant's Truck.

1. Background

During the testimony of the officer who found defendant's truck, the prosecutor introduced a picture of the interior of the truck, identified at trial as People's exhibit No. 7. The picture revealed a hat in the truck that matched the description of the hat that witnesses said defendant wore during the robbery. After the officer testified, defendant objected to the admission of the photograph on unspecified grounds, and the trial court stated that "we can talk about that."

Defendant thereafter testified (on cross-examination) that exhibit No. 7 was a picture of his truck. On redirect, he testified that the picture showed items scattered around the front seat, and that that was not the condition in which he left his vehicle earlier that day. Following his testimony, defendant again objected to the admission of the photograph, based on lack of foundation. The trial court overruled the objection, and the exhibit was admitted into evidence.

2. Analysis

On appeal, defendant renews his objection that the photograph lacked a proper foundation and should not have been admitted into evidence. "A photograph is a 'writing' and '[a]uthentication of a writing is required before it may be received in evidence.' (Evid. Code, §§ 250, 1401, subd. (a).)" (*People v. Beckley* (2010) 185 Cal.App.4th 509, 514.) "A photograph or other writing may be authenticated by 'the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is' (Evid. Code, § 1400), including the two kinds of evidence described by our Supreme Court in *People v. Bowley* (1963) 59 Cal.2d 855."

(*Ibid.*) "It is well settled that the testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is a legally sufficient foundation for its admission into evidence. [Citations.]" (*Bowley* at p. 859.) The foundation may also be provided by someone "who is otherwise qualified to state that the representation is accurate," or "by the aid of expert testimony even where there is no one qualified to authenticate it from personal observation." (*Id.* at p. 862.)

Here, defendant testified that exhibit No. 7 depicted his truck. Even assuming arguendo that this was insufficient to lay a proper foundation for the photograph, we conclude that the admission of the exhibit did not prejudice defendant. (*People v. Beckley*, *supra*, 185 Cal.App.4th at p. 516.) The photograph apparently showed a green "beanie" matching the description of the hat worn by the robber. There was other, overwhelming evidence that defendant was the robber, as set forth above. (Pt. II.A.3.b.) Given the state of the evidence, it is not reasonably probable that defendant would have been acquitted of the charged crimes if the court had not admitted the picture of his truck. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Beckley* at p. 517.)

D. Prosecutor's Conduct.

1. General legal principles

Defendant next argues that the prosecutor committed misconduct several times during trial. " 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

We first note that defendant did not object to most of the several incidents of alleged misconduct that he complains of on appeal. " 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on

the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]" (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.) A defendant will be excused from the necessity of a timely objection and/or a request for admonition if either would be futile. (*Ibid.*) "In addition, failure to request the jury be admonished does not forfeit the issue for appeal if ' "an admonition would not have cured the harm caused by the misconduct." ' [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.' [Citations.]" (*Id.* at pp. 820-821.) Contrary to defendant's claims, he has made no showing that his failure to object below was excused for any of the foregoing reasons.

Even assuming arguendo that defendant's arguments were not forfeited by his failure to object at trial, defendant nonetheless fails to identify reversible error, as set forth below.

2. Defendant's employment status

a. Background

Defendant testified on direct examination that, on the night before the events in question, he slept at the home where police found him after the robbery, left the house around 8:00 or 8:30 a.m. with his uncle, then returned to the house around 10:00 or 10:30 a.m. He then "ended up going upstairs because that's—because I get high. I'm going to tell you the truth. I was—we—they get high. We was getting high at the time, and I went upstairs, and we was getting high."

On cross-examination, the prosecutor asked defendant, without objection, about two prior convictions, then asked whether it "would . . . be fair to say you have not had a job your entire adult life?" Defendant acknowledged that he was not employed at the time of the armed robbery, and that he was "snorting heroin" on the day in question. Defendant further testified that heroin cost $30 per gram, that he sought it out on a regular basis because "I have to have it," and that he was addicted to the drug.

Also during cross-examination, the prosecutor asked about a time when defendant had lived in Texas. Defendant testified that he had stayed with his aunt, but the trial court sustained an objection to the prosecutor's question about whether the aunt "gave [defendant] the boot out of Texas." The court also sustained an objection to the prosecutor's question about a telephone conversation defendant had had the previous week asking his mother whether he could get assistance from his aunt.

During closing argument, the prosecutor stated, without objection, that "the Judge is going to tell you that motive can be used to show this particular individual over here committed that robbery because he had a motive to rob. You have heard him tell you, 30 bucks a gram, snorting up heroin, he's unemployed, where is he going to get this money. He's not working, and he needs his heroin because he told you, I'm addicted, I got to use it. There's his motive. There's the reason this man pulled that robbery right now because he's not working, but he wants his heroin. Not only wants his heroin, he needs his heroin." The prosecutor did not refer to defendant's aunt during closing argument.

b. Analysis

Defendant argues that it was "serious misconduct to use evidence concerning a defendant's unemployed and homeless status to characterize him as a parasite," and to "argue his lack of income and financial needs as a criminal motive." "[A] defendant's poverty generally may not be admitted to prove a motive to commit a robbery or theft; reliance on such evidence is deemed unfair to the defendant, and its probative value is outweighed by the risk of prejudice." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1076; cf. *People v. Reid* (1982) 133 Cal.App.3d 354, 362 [defendant's need for money to support drug habit may be logically relevant to prove motive, Evid. Code, § 1101].)

Even assuming arguendo that it was error to argue that defendant's lack of income was a motive for robbery, it does not amount to reversible error. *People v. Herring* (1993) 20 Cal.App.4th 1066, upon which defendant relies, is instructive. There, the prosecutor argued that defendant was " 'like a parasite. He never works. He stays at people's homes. Drives people's cars. He steals from his own parents to get anything.

He won't work for it," comments that the court concluded "had *nothing to do with the crimes alleged*" and "invited the jury to decide the case based upon its own value judgment and not on the law." (*Id.* at pp. 1074-1075, italics added.) The court nonetheless concluded that these statements by themselves, absent a timely objection, would not have been grounds for reversal, because "a timely admonition likely would have cured the harm," which was the case here as well. (*Id.* at p. 1075.)[8] This is especially true because here, unlike in *Herring*, the prosecutor was not arguing that defendant's unemployment showed his predisposition to commit crime, only that he had a motive to do so.

Finally, we disagree with defendant that asking two questions about his aunt resulted in a fundamentally unfair trial that violated his due process rights. One question related to defendant's behavior, and the other related to a request for assistance through defendant's mother. The prosecutor dropped the line of questioning after objections to both questions were sustained, and the prosecutor apparently made no mention of defendant's aunt during closing argument. The prosecutor likewise did not use the term "sponging off" defendant's aunt, as defendant implies on appeal.

3. No improper reliance on "fiscal crisis"

a. Background

On cross-examination at trial, the officer who searched the house where defendant was found was asked whether the gun that was found was tested for fingerprints or DNA. The officer testified, "I am not sure if it ever got processed. I know that there was a work order I completed when it was booked into evidence to have processed and we handled it in such a way at that time so as not to contaminate it." On redirect, the following exchange took place:

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8 The *Herring* court nonetheless reversed because the comparison of defendant to a parasite had a cumulative effect when combined with the prosecutor's comment that defendant was a " 'primal man,' " his comparison of defendant to " 'a dog in heat,' " and his remarks that "[his] people are victims," whereas defense counsel's "people are rapists, murderers, robbers, child molesters." (*People v. Herring, supra,* 20 Cal.App.4th at pp. 1073-1075.) There is no example of such egregious argument in the record before us.

"Q There's no evidence of the prints ever being done on that gun; isn't that fair to say?

"A Not that I'm aware of.

"Q Is Vallejo still bankrupt?

"A I believe so.

"[Defendant's attorney]: Objection, relevance.

"The Court: Sustained."

During his closing argument, defense counsel emphasized a purported lack of evidence connecting defendant with the crime: "There's no money recovered. Wouldn't that be around there somewhere. Is there any fingerprints [*sic*] on anything at all. Is there any DNA on anything. No, none of that exists." Counsel later highlighted the lack of fingerprints on the cell phone and briefcase that were recovered, and the lack of DNA on the hat that was found in defendant's truck.

During rebuttal argument, the prosecutor stated, without objection: "[Defense counsel] says there's no prints, there's no DNA. *This was an eyewitness who identified this guy who spent 15 minutes with him. How much more do you need.* This isn't television, you know, and this isn't, um, this unlimited source of funds that, um, fictional stories have, you know. Television that's entertainment. That's there to entertain. That's why they have all these laser beam things and tricks and techniques. This is the real world. *And after 15 minutes of standing there next to the defendant, you don't need DNA, you don't need fingerprints. You don't need photographs. You don't need anything else*." (Italics added.)

b. Analysis

Defendant, omitting the italicized portions of the prosecutor's rebuttal argument, above, claims that the argument amounted to prosecutorial misconduct, because counsel was trying "to dissuade the jurors from demanding the most reliable evidence of defendant's guilt or innocence, and persuade them that shoddy police work was necessitated by the City of Vallejo's bankrupt condition." Reading the entire excerpt, however, it is clear that the prosecutor argued no such thing. Instead, he was arguing that

there was sufficient evidence to convict defendant, even absent fingerprint and DNA evidence. Although it is true that the prosecutor asked a police officer whether Vallejo was bankrupt, the trial court sustained the objection, and jurors were later instructed that they were to disregard a question where the court sustained an objection, and that nothing the attorneys said during the trial or during summation was evidence. (CALCRIM No. 222.) Although the prosecutor argued that there was not an "unlimited source of funds" to use things like "laser beam things and tricks and techniques," this could not reasonably have been understood by the jury to mean that police were not required to provide evidence of defendant's guilt. The rebuttal argument did not amount to misconduct.

4. Presumption of innocence

a. Background

Also during rebuttal argument, the prosecutor argued, again without objection: "There's a presumption of innocence, and the defense does not have to do a thing during the course of a criminal trial. They don't have to call any witnesses. The defendant certainly doesn't have to testify. Um, and that's something that each and every one of us would wish for us if we were sitting at that table at any point in our lives or any member of your family or our friends. I'm with that. I'm okay with that. You hold me to my burden. All right. But once the defendant—once a defense puts that case on and actually supplies you with evidence, unanswered questions that they could have answered are subject to your scrutiny, and you can ask yourself these questions." The prosecutor later argued, again without objection, that "earlier today we talked about the presumption of innocence, remember when we were picking a jury, and we emphasized, I think to a great detail, that there's a presumption of innocence every time someone is charged with a crime and they're sitting at that table. Well, that presumption of innocence doesn't last forever. That presumption of innocence ended the moment we rested in this case, and you've heard all of this evidence. Because when you go back there and deliberate, there's no longer a presumption of innocence after you compare and contrast all of this

evidence. You're going to look at this evidence, and that presumption is gone. That presumption is off the table. It's for you to decide what the state this evidence is."

b. Analysis

Defendant claims that the prosecutor argued that "the burden of proof shifted when the defendant took the stand" and that "the presumption of innocence evaporated prior to deliberations," which amounted to misconduct because it suggested that the jury could "dispense with the requirement of proof beyond a reasonable doubt." We consider the prosecutor's argument comparable to statements made in *People v. Goldberg* (1984) 161 Cal.App.3d 170, 189. There, as here, the remarks "essentially restated, albeit in a rhetorical manner, the law as reflected in" section 1096, which provides that a defendant in a criminal action is presumed innocent *until the contrary is proven*. (*Goldberg* at p. 189.) In the context of the whole argument and the instructions, we see no reasonable likelihood that the jury construed the prosecutor's remarks as urging jurors to rely on a standard other than proof beyond a reasonable doubt. (*People v. Marshall* (1996) 13 Cal.4th 799, 831.)

5. Argument regarding defendant's connection to truck

a. Background

The restaurant customer who was robbed testified that when he was talking to the 911 dispatcher, someone on a bicycle said he had seen the suspect flee, and information about the suspect's vehicle (a gray truck) was relayed to the 911 dispatcher.[9] The police officer who arrived at the scene of the robbery testified that he received information from witnesses, victims, and the dispatcher, including a description of the suspect's vehicle as "a silver Ford pickup older model." Defense counsel highlighted during closing argument that the jury never heard testimony from the witness who described defendant's truck, arguing that this absence of testimony was an example of gaps in the evidence supporting defendant's guilt.

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9 The witness on a bicycle did not testify at trial, but his statement was admitted over defendant's objection as a spontaneous statement (Evid. Code, § 1240), a ruling that defendant does not challenge on appeal.

The prosecutor argued during rebuttal, without objection: "There are different types of evidentiary systems in the world. Thousands of years ago when Nomads left Asia and came across Alaska on the Bering Straits and spread down through North America, a lot of these cultures, and not just there, but all over the world, would have Shamans in their small communities that they go to to answer their questions. That's their system of justice. When they have an issue that needs to be resolved, they don't come to the Superior Court of Solano in front of Judge Moelk to answer those questions. Although—well, I won't say it. They had their system of justice, and that included the Shaman in whatever their culture was utilizing what they had as evidence, and they would have trinkets and feathers and carvings and items that were of significance to their cultures. In some of the communities, what would happen is that Shaman would get down and draw a circle on the ground and drop these items in that circle; and for that particular question, the only items that landed within that circle are items that would be used in coming to a conclusion and settling that dispute, whatever that dispute was.

"Now, [defendant's attorney] is asking you to go outside that circle in making your determination in this case. Remember what he said, there's no description of the truck given to you directly by somebody. Well, that doesn't matter. That's outside the circle because there's competent evidence by the person who had seen that robbery who flagged down [the restaurant customer] and said he got in a gray truck. *He just took off in a gray truck. Remember that. There is no impeachment whatsoever regarding that statement, and that statement is as valid as evidence as* [*the restaurant employee's*] *direct testimony to you today. All of the evidence that came in there, unless you find somebody lying, is evidence that has value, evidentiary value. And that guy who saw the robbery and flagged down* [*the customer*] *as he's driving off says he got in a gray truck is competent evidence.* This argument that there was no description of the truck is, first of all, inconsistent with what the evidence is; but, second of all, asking you to go outside the circle and require something that I'm not required to do. *A passerby on a bicycle who sees something like this and gives that bit of information may or may not have been at the*

scene when the cops are there. It's irrelevant. What was relevant is what they screamed out when [*the customer*] *came back* [*to the scene of the robbery*]." (Italics added.)

b. Analysis

Defendant, who omits the italicized portions of the rebuttal argument quoted above, claims that the prosecutor's argument regarding a "magic circle" (a phrase the prosecutor did not actually use) amounted to misconduct, because it misstated the law and contained facts not in evidence. He claims that the prosecutor was arguing that he was not required to introduce evidence connecting defendant's gray truck to the robbery. To the contrary, a review of the entire argument shows that the prosecutor in fact *highlighted* the competent evidence that showed the connection, and was simply making the point that he was not required to provide live testimony from the witness who provided a description of defendant's truck.

As for the prosecutor's reference to the justice systems of ancient cultures, " '[i]t is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are *illustrations* drawn from common experience, *history* or literature.' [Citation.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 567, italics added.) We agree with respondent that there is no reasonable likelihood that the jury understood the prosecutor's argument to mean that jurors should use the concept of a circle on the ground as a standard to be used during deliberations. Again, in light of the fact that the jury was correctly instructed that nothing the attorneys said during closing argument was evidence (CALCRIM No. 222), we reject defendant's argument that the prosecutor's statements were grounds to reverse the judgment.

In sum, defendant fails to establish reversible error based on prosecutorial misconduct.

E. Cumulative Error.

Claiming that the cumulative effect of the errors he has identified on appeal rendered his trial fundamentally unfair and violated his due process rights, defendant argues that the judgment should be reversed on that basis. "Having found no prejudicial error, we reject this contention." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1099; *People v. Kipp* (1998) 18 Cal.4th 349, 383 [issues raised on appeal did not singly or cumulatively establish prejudice requiring reversal of convictions].)

F. Sentencing Issues.

1. Cruel and unusual punishment

Defendant argues for the first time on appeal that the sentence imposed here (26 years, 4 months in prison) constitutes cruel and unusual punishment, in violation of the Eighth Amendment. Having failed to raise this issue below, it is waived. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) Even if he had raised the issue, it lacks merit. "Successful challenges based on proportionality are extremely rare. [Citation.]" (*Kelley* at p. 583.) Defendant must show that a penalty is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) Defendant, who had a prior felony conviction and who was on probation at the time of the crime, brandished a shotgun, and used force or fear when taking property from two strangers. On these facts, defendant's sentence is not grossly disproportionate to his culpability. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1099.)

Relying on *Brown v. Plata* (2011) __U.S.__ 131 S.Ct. 1910, in which the United States Supreme Court described the substandard conditions in the state's prison system due to "exceptional" overcrowding (*id.* at p. 1923), defendant claims that the conditions under which he will serve his sentence amount to cruel and unusual punishment. Of course, any complaint about the conditions of his confinement are premature, absent any evidence regarding the actual conditions he experiences. This is especially true in light

of the fact that the state has been ordered to take steps to alleviate the conditions in its prison system. (*Id.* at p. 1946.)

2. No error in abstract of judgment

At the conclusion of the preliminary hearing, the trial court held defendant to answer, and found defendant in violation of probation in another felony matter. At the prosecutor's request, the court put over sentencing in the separate case to accompany the instant case. At the sentencing hearing, the trial court sentenced defendant in this case (No. VCR205764) to 26 years, 4 months in prison, plus a consecutive eight-month term in the separate case (identified on the abstract of judgment as No. VCR200549, in which defendant apparently did not appeal), for a total of 27 years in prison, which is reflected on the abstract of judgment.

In his opening brief, defendant claims that the oral pronouncement of judgment and the abstract of judgment are "inconsistent," and that the basis for the eight-month sentence in the probation violation case "does not appear in the record on appeal." We agree with respondent that the record makes plain that defendant's claims are unfounded, which is perhaps why defendant does not address them in his reply brief.

III.
DISPOSITION

The judgment is affirmed.

Sepulveda, J.*

We concur:

Ruvolo, P.J.
Reardon, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.